IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3745 of 1988

For Approval and Signature:

HON'BLE MR.JUSTICE AKSHAY H.MEHTA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

NANDLAL N DHAMCCHA

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 3745 of 1988

MR PV HATHI for Petitioner No. 1

MR PD BHATE, AGP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 21/04/2004

ORAL JUDGEMENT

1. In this petition the only relief that is prayed for is to declare that petitioner was entitled to be promoted to the post of Deputy Executive Engineer with

effect from 24th July, 1980 and/or 31st May, 1988 when several juniors of the petitioner were promoted to the said post and to grant deemed date of promotion as aforesaid and to pay all consequential benefits. Originally the petition was filed for direction on the respondent to promote the petitioner to the post of Deputy Engineer. However, during the pendency of the petition in the year 1995 he came to be promoted and hence the relief is confined to aforesaid only.

2. According to the petitioner, he was appointed as Junior Engineer being a graduate in Mechanical Engineering and placed in the Stores Division of Irrigation and Mechanical Sector under the Superintending Engineer (Mechanical Circle No. 1) at Baroda. Shortly thereafter i.e. after a period of one year a criminal complaint was filed against the petitioner being Criminal Case No. 700 of 1973 for the offences under Sections 409, 477 A read with section 120-B of the Indian Penal Code. The said case was filed in the Court of Judicial Magistrate First Class at Vyara. In view of the inquiry of the criminal case petitioner was suspended from the service on 1st June, 1974. On conclusion of the said trial the petitioner alongwith other two co-accused, namely Mr. D.M. Gandhi, who was then Deputy Engineer i.e. immediate superior officer of the petitioner and one Mr. A.R. Joshi, the Clerk was acquitted of all the charges levelled against him. Having been aggrieved by the said judgment and order of the acquittal, the State Government preferred criminal appeal before this Court being Criminal Appeal No. 565 of 1976. The said appeal was decided on 21st March, 1978. This Court confirmed the decision of the learned Magistrate and dismissed the appeal of the State Government.

2.1. It is the say of the petitioner that he was reinstated in the service in the month of September 1978 and the period of suspension was regularized vide order dated 30th September, 1978 passed by the Secretary to the Government, P.W.D.

2.2. It appears that subsequently vide order dated 24th July, 1980 several persons came to be promoted to the post of Deputy Executive Engineer. All these were Junior Engineers (Mechanical) and in the cadre of Junior Engineers, they were placed below the petitioner in the seniority list. In other words, the petitioner was at serial no. 74; whereas other Junior Engineers who had been promoted were at serial nos. 77, 78, 80, 84, 86 and 87. The petitioner was intimated vide letter dated 22nd

August, 1980 that he did not possess the requisite qualification for promotion and, therefore, promotion was not granted to him. The said reply had been given in response to the application that was made by the petitioner on 28th July, 1980. It may be noted here that so far the requisite qualification for promotion was concerned, it was service for three years as Junior Engineer in the case of a graduate. The petitioner had already rendered three years' service as Junior Engineer and as stated above, he was a graduate in the Mechanical Engineering. He, therefore, possessed requisite qualifications. From the record of the petition, it also appears that the criteria for promotion was proved merit and efficiency. Second occasion for promotion arose in the year 1988 and vide order dated 31st May, 1988 several persons were promoted from the post of Junior Engineer to various other posts. Out of these persons also, there were many juniors to the present petitioner and hence the petitioner made a representation but he was informed that departmental proceedings were initiated against him and ultimately the petitioner approached this Court by way of this petition. It may be also noted here that so far the co-accused of the petitioner Mr. Gandhi was concerned, he was given promotion to higher post i.e. the post of Executive Engineer but no such grace was shown in the case of petitioner.

2.3. In the present proceedings the respondent was directed in Civil Application No. 469 of 1990 filed by the petitioner to consider his case for promotion. The petitioner did not hear anything about the inquiry initiated against him for long . Ultimately he came to be promoted on 22nd November, 1995. He ultimately retired from the post of Deputy Executive Engineer on 31st December, 2003.

2.4. In the aforesaid circumstances the petitioner has approached this Court in view of the fact that the petitioner has now retired in the year 2003 and that he was given promotion to the higher post, he has now restricted his case to the grant of deemed date to the promotion together with all incidental financial benefits.

3. Mr. P.V. Hathi, learned advocate appearing for the petitioner has submitted that the incident took place in the year 1971. The petitioner alongwith two others was prosecuted in the competent criminal court and at the end of the trial, he and others were acquitted. Even the appeal filed by the State Government against the order of acquittal was dismissed

by this Court. The decision of this Court confirming the order of acquittal was passed in the year 1978. Thereafter, the respondent did not prefer any further proceedings to challenge the acquittal. However, mischief was done for grant of promotion to the petitioner. Ultimately after 10 years of the acquittal, respondent thought it fit to issue charge-sheet and hold inquiry in respect of the incident which took place way back in the year 1971. It is rather strange that the petitioner who was acquitted by the Court of the Ld. Judicial Magistrate First Class and against whom acquittal appeal filed by the State was dismissed by this Court, the Government i.e. respondent thought it fit to re-open the chapter after lapse of 10 to 11 years so as to deny promotion.

3.1. It may be noted here that when the promotions were in contemplation, there was no charge-sheet submitted to the petitioner. It was only after the promotions have been taken into consideration, the charge-sheet came to be served on the petitioner. In that view of the matter, it could not have been a ground for not considering the petitioner for the promotion. In the case of Union of India v. K.V. Jankiraman reported in AIR 1991 S.C. p. 2010 the Apex Court has laid down as under :-

> "It is only when a charge-memo in a disciplinary proceedings or a charge-sheet in a criminal prosecution is issued to the employee it can be said that the departmental proceedings / criminal prosectuion is initiated against the employee. The sealed cover procedure is to be resorted to only after the charge-memo / charge-sheet is issued. The pendency of preliminary investigation prior to that stage will not be sufficient to enable the authorities to adopt the sealed cover procedure."

The aforesaid principle, therefore, clearly prescribed that the process of promotion had already commenced and thereafter charge-sheet was issued to the employee. The fact regarding pendency of preliminary investigation, etc. cannot be a ground for not considering the promotion to the concerned employee. In the instant case the charge-sheet has been issued on a later date. When the process of promotion commenced, it was not there. This, therefore, could not have been ground for not granting promotion to the petitioner even when juniors were promoted to the post of Deputy Executive Engineer. It is a matter of surprise that though the petition is of

the year 1988, till this date the respondent has not filed affidavit-in-reply. Therefore, what is their stand in this proceedings is not on record. However, whatever the letters that have been annexed here simply make a mention either of not possessing requisite qualification or of initiation of the inquiry.

4. As stated above, the petitioner is a graduate in B.E. (Mech.). He has rendered more than three years' service as Junior Engineer. In that view of the matter, he was qualified for getting the promotion. So far the proved merit and efficiency are concerned, nothing adverse to the same has been said by the respondent. If that be so, we have to accept the averments that have been made in the petition by the petitioner particularly when the respondent has chosen not to file affidavit-in-reply. In the decision rendered in the case of Naseem Bano v. State of U.P. reported in AIR 1993 S.C. p. 2592 the Apex Court has clearly observed that in the event of failure of respondents to file the affidavit-in-reply, the averments of the petition were required to be considered true. Even otherwise also from the record of this petition, it only simply appears that except aforesaid two reasons there was no justification on the part of the respondent not to grant promotion to the petitioner atleast in the year 1988. Mr. Hathi has now restricted his claim to the later date only and for the reasons stated above, I do not find any difficulty for directing the respondent to grant the petitioner deemed date of promotion to the post of Deputy Executive Engineer with effect from 31st May, 1988 and to pay him all the consequential benefits thereof. The respondent is further directed to pay to the petitioner all the arrears on or before 31st August, 2004.

With aforesaid direction, this petition is allowed. Rule made absolute with no order as to costs.

[AKSHAY H. MEHTA, J.]

* Pansala.